

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

**NEW YORK STATE RESTAURANT
ASSOCIATION,**

Plaintiff,

- against -

**NEW YORK CITY BOARD OF HEALTH,
NEW YORK CITY DEPARTMENT OF HEALTH
AND MENTAL HYGIENE, and Thomas R. Frieden,
In His Official Capacity as Commissioner
of the New York City Department of Health
and Mental Hygiene,**

Defendants.

No. 2008 Civ. _____

**DECLARATION OF
DEBRA DEMUTH**

DEBRA DEMUTH hereby declares under penalty of perjury:

1. I am the Global Director of Nutrition of McDonald's Corporation. After I earned a doctorate in nutrition from Florida State University, I served on the faculty of Emory University School of Medicine and, since leaving academia, have worked as a nutritionist for a number of companies in the food and beverage industry.

2. McDonald's is the largest restaurant company in the world. It feeds more than 50 million people a day in 118 countries. We provide convenient, wholesome, safe, and affordable food to millions of people each day. We have taken our responsibility to provide nutrition information to our customers seriously -- and have taken a comprehensive approach in providing this information.

3. For reasons stated below, we believe that New York City's new Regulation 81.50 compromises the meaningfulness and relevance of nutrition information to our consumers by

focusing just on calories. For the benefit of the long-term health objectives of consumers, it's more than just calories, it's also the nutrients that count. In addition, a comprehensive approach to a healthy lifestyle is needed – and not just a healthy diet. Further, implementing an environmental nutrition intervention at point of purchase (Regulation 81.50) that has not been carefully evaluated through research poses risks to the consumer and does not reflect sound public health practices.

McDonald's Comprehensive Approach to Nutrition and Health Issues

4. McDonald's has taken a comprehensive approach to nutrition and health issues based on three simple concepts—choice, information, and balance. We have termed this approach “Balanced, Active Lifestyles.” We have increased the variety of our menu choices; provided nutrition composition of our foods in 5 different ways to the consumer; and have taken a leadership role in promoting physical activity through a variety of programs. Information about McDonald's “Balanced, Active Lifestyles” can be found on McDonald's website (Ex. A hereto) as well in documents published in recent years, such as McDonald's Initiative to Support Balanced, Active Lifestyle (Ex. B hereto) and McDonald's 2006 Worldwide Corporate Responsibility Report (Ex. C hereto).

5. McDonald's developed the Balanced, Active Lifestyles framework under the guidance of McDonald's Global Advisory Council on Balanced Active Lifestyles, a council of thirteen independent nutrition, health and fitness experts, and the European Nutrition Task Force, a group of independent nutrition professionals focusing on Europe.

6. The first component of the Balanced, Active Lifestyle framework is menu choice. McDonald's seeks to accommodate customers' varied energy and nutrition needs by expanding our menu offerings to include entrée-sized salads with low-fat dressings and portion control

through providing a range of serving sizes at point of purchase. McDonald's provides other menu options such as grilled chicken sandwiches, fruit and yogurt desserts, soups and fresh fruit side options. For children, parents have choices of sandwiches, side dishes, and beverages, including low-fat milk and 100% fruit juice. In addition to our menu choices, McDonald's offers customers the opportunity to customize their selections through the inclusion or deletion of menu item components such as mayonnaise, margarine, low-fat dressings and sauces.

7. The second component of the Balanced, Active Lifestyle framework is information: specifically, the nutritional composition (including 14 nutrients) of our foods. For over 30 years we have made nutrition information of our menu items available for our customers and now this is available in 5 easily accessible ways: brochures, tray-liners, food packaging, website and our toll-free hotline. In fact, the nutrition information section of our website including Bag a McMeal has over 736,000 visits yearly or a monthly average of more than 61,000 visits. Our toll-free hotline has received approximately 24,000 inquiries in the first 6 months of 2007 regarding the nutritional content of our food for an average of 4,000 per month. The Food, Nutrition and Fitness section of our website receives over 1.4 million visits per year averaging over 16,000 per month.

8. The third component of the Balanced, Active Lifestyle framework is balance: balancing energy intake with energy expenditure through increasing physical activity. In the reference FDA's *Calories Count: Report of the Working Group on Obesity*, the report concludes "for maintenance of a healthy body weight it is the consumption and expenditure of calories that is most important" and "obesity, at its most fundamental level, is a direct function of caloric imbalance." Emphasis on calorie intake alone is only part of the equation and may not contribute towards the maintenance of a healthy body weight. Consumers need to know and

understand how to apply the concept of energy (calories) consumed and energy expended to their daily lives. Emphasizing calories alone is only half the equation.

9. Physical activity is a critical component in maintaining appropriate energy balance and having a healthy lifestyle. McDonald's recognizes this need and sponsors many programs to motivate customers to be more physically active. In 2004, for example, McDonald's expanded the "Step With It!" program to encourage middle-school children and their families to incorporate physical fitness into their lives by increasing their daily walking. McDonald's promoted an adult version of the Happy Meal, "Go Active! Happy Meal," which contained a Stepometer to log the number of steps taken and Step with It! booklet developed by a well-known exercise physiologist, Bob Green. McDonald's supports several initiatives to encourage children to be physically active, such as the "Get Moving with Ronald McDonald," a show seen by over 1 million children in the U.S. since 2003. McDonald's funds local and world-wide community sports programs, including the Olympic Games.

McDonald's approach to providing Nutrition Information

10. McDonald's provides nutrition information to consumers in a variety of ways.

- First, McDonald's makes nutrition information available to consumers in the restaurant through its nutrition facts brochure. The brochure provides a comprehensive list of the nutritional composition (including 14 nutrients) of our standard menu items. It discloses, for each menu item: serving size, calories, calories from fat, total fat, saturated fat, trans fat, sodium, carbohydrates, dietary fiber, sugars, protein. It also discloses the percentage of recommended daily values for a 2000 calorie diet of total fat, saturated fat, cholesterol, sodium, carbohydrates, dietary fiber, and vitamins A and C, calcium, and iron. A copy of

the current brochure is attached as Exhibit D. Inclusion of a comprehensive list of nutrients in addition to calories including total fat, saturated fat, trans fat, and sodium better enables customers to make their selections based on long-term health objectives, such as cardiovascular health, as opposed to just calories.

- Second, McDonald's offers a comprehensive and interactive nutrition section on its website. The website publishes our nutrition facts brochure and lists the ingredients of each component of a menu item. It publishes the food exchange values of each menu item, as defined by the American Diabetes Association, for customers who have diabetes or who use the food exchange system for weight control. For customers with food allergies, the website lists food allergens in each menu item. The website is interactive. A customer can customize any menu item, with the website calculating the calories, fat, saturated fat, cholesterol, sodium, carbohydrates, dietary fiber, and protein in the customized menu item. A customer can build a meal, with the website calculating this information (including percentages of daily values as noted above) for the entire meal. The website also includes information on physical activity and balanced diet choices, and a frequently asked questions section that provides details on our philosophy and recommendations for maintaining a balanced active lifestyle.
- Third, McDonald's provides tray-liners featuring nutrition information for its menu items, as well as quick tips for using that information in order to achieve a balanced, active lifestyle. Like the brochures, the tray-liners provide comprehensive information about the nutritional composition of our menu items.

- Fourth, nutrition information is available to customers through a toll-free telephone number. Customer service representatives are trained to answer customers' questions and to provide nutrition information about our menu items. Like the written materials, the customer service representatives can provide a customer with any or all of the information about the nutritional contents of the menu items.
- Fifth, McDonald's prints nutrition information directly on much of our food packaging. McDonald's was the first major restaurant company to offer information in this format. McDonald's presents the food's nutrition content for five elements: calories, protein, fat, carbohydrates and sodium on the wrapper or package in the FDA formatted Nutrition Facts Panel as well as in a graphic icon. To provide consumers with the ability to anchor the information to their daily needs, each element's nutrition value is presented numerically and graphically as a percentage of the recommended daily value for a 2000 calorie diet in an icon-based format, easily understood independent of language.

Disagreement with Regulation 81.50.

11. We strongly disagree with New York City's proposed requirement that McDonald's isolate and post caloric information alone next to menu items on our menu board. The proposal undercuts McDonald's comprehensive approach to educating consumers about health and nutrition. We believe that our approach is based on the public health community's consensus for communicating nutrition and health information to consumers to enable them to make the right choices for their long-term health objectives and we believe that the City's approach is unsound.

Consumers need more guidance than just “calories.” Simply put, we strongly disagree with the message that the City of New York demands that we convey, for the following reasons.

- *First*, by requiring McDonald’s to overemphasize the importance of calories, the City’s regulation will undermine McDonald’s carefully developed approach to communicating with our customers about nutrition and health. We believe caloric information is only one part of health and good nutrition and that consumers should focus on more complete nutrition information. In forcing McDonald’s to disassociate caloric information from more comprehensive health and nutrition information, the City undermines McDonald’s ability to explain the presence or absence of a variety of other important nutrients and factors that are equally important in promoting consumer health and wellness. For example, the highly regulated definition of a “healthy” meal by the FDA focuses on restricting fat, cholesterol, and sodium in addition to requiring the presence of 3 of 6 nutrients (protein, fiber, vitamins A and C, iron and calcium). Similarly, the 2005 Dietary Guidelines, published jointly by the U.S. Department of Health and Human Services and the Department of Agriculture, emphasize the importance of including nutrient dense foods and moderating saturated fat, trans fat, cholesterol and sodium. For nutrition information to motivate and be meaningful to consumers, it must be provided within the broader context of helping consumers achieve a healthy diet and lifestyle. The 2005 Dietary Guidelines identify nine core areas that relate to diet and health, and caloric intake is only one part of one such area. The nine areas are: adequate nutrients within caloric needs, weight management, physical activity, food groups to encourage, fats, carbohydrates, sodium and potassium, alcoholic

beverages, and food safety. Thus, the 2005 Dietary Guidelines do not over-focus on or myopically isolate calories. Rather, they recommend that individuals consume a variety of nutrient-dense foods and beverages within and among the basic food groups; that they balance calories from foods and beverages with calories expended; that they engage in regular physical activity and reduce sedentary activities; that they consume a variety of fruits, vegetables, whole-grains, and milk products each day; and that they limit intake of fats and oils high in saturated or trans fatty acids. By highlighting the calories of the food product alone and in isolation, Regulation 81.50 will require McDonald's to contradict its carefully developed approach to nutrition and health, which includes menu choice, nutritional information in context, and physical activity.

- *Second*, we believe that the information will be meaningless to most consumers, who need an "anchor" to understand nutrition information. Most consumers do not know their recommended daily caloric intake or the recommended daily allowances for various nutrients. McDonald's helps consumers put nutritional information in context with an "anchor," in the form of a graphical icon-based bar-graph on its food wrappers. The graph shows consumers not only the nominal amount of various nutrients (calories, protein, fats, carbohydrates and sodium), but the amount of the recommended Daily Value for a 2000 calorie diet. Without seeing nutritional information in context, unadorned caloric value is a confusing and meaningless number to many consumers, and could lead individual consumers to make the wrong choices for their long-term health goals. Regulation 81.50, however, demands that restaurants give caloric information out of context, without such an anchor.

- *Third*, we believe that the regulation's focus on calories alone is the wrong approach to addressing increasing rates of obesity. We are of the view that no single factor is responsible for the increasing rates of obesity. Rather, we believe that the causes are complex and fueled by many factors, including genetics, cultural issues, economic factors, excess food consumption and today's increasingly sedentary lifestyles. We believe that the key to maintaining a healthy weight is striking the right balance between calorie intake and physical activity. By focusing on calories alone, we think that the City is looking for an ineffectual "magic bullet" that may mislead consumers.
- *Fourth*, we do not believe that the City's focus on calories on the menu board is scientifically sound in that it is not based on findings from scientific research. In my opinion, the scientific basis for evaluating the effect of communicating nutrition information at the point of purchase is at a very early stage. That opinion is shared by others. The Keystone Forum's final report (May 2006), concluded that there is no public health consensus on how consumers use nutrition information, and that:

There is a clear need for more research regarding how the provision of nutrition information, claims (such as "low calorie"), and symbols influence consumer preference and choice for away-from-home food consumption situations. Of particular concern is how, when, and why consumers use nutrition information and claims during their decision-making processes. More specifically, a better understanding is needed of the types of factors that moderate consumers' responses to the provision of nutrition information and claims for away-from-home foods.

The chapter concludes with a list of suggested research questions for addressing these topics. Similarly, in a recent review published in *Preventative Medicine*, researchers evaluated all research articles they could find that influenced the

environment through food availability, access, pricing or information at the point-of-purchase in various settings. Due to the small number of interventions that were of suitable quality and design to include in the review, the authors concluded: "Research is needed using consistent methods, better assessment tools, and longer durations; targeting diverse populations; and examining sustainability." (*Seymour, et al., "Impact of Nutrition Environmental Interventions On Point-Of-Purchase Behavior In Adults: A Review," 39 Preventive Medicine S108, 2004*)

Public Health Community Recommendations on Menu Board Labeling

12. It is not accurate to suggest that there is a public health community consensus on menu board labeling. The *Keystone Forum on Away-From-Home Foods* report lists the "pros" and "cons" of menu board labeling, and the "cons" outweigh the "pros" for menu board delivery of calories. The actual recommendation in the report for providing consumers with nutrition information is as follows:

Recommendation 4.1: Away from home food establishments should provide consumers with calorie information in a standard format that is easily accessible and easy to use. This recommendation emphasizes accessibility and ease of use – calorie content next to price on menu boards may not be the solution.

The pros and cons of menu board labeling as listed in the Keystone report are as follows:

Menus and Menu Boards (for Standard Menu Items)

Pros:

- Easy to find and linked to an essential information method in the business
- At the point of purchase and decision-making
- Can use and compare options at the point of purchase
- Is what state legislatures and Congress are considering requiring
- Would provide restaurants with an incentive for reformulation
- Allows people to consider price and nutrition information together in the same place

Cons:

- Can't provide the full range of nutrients on the menu because of lack of space (but could be supplemented with more information in writing, upon request)
- Consumers may not be able to add up individual items to construct a full meal choice and determine its nutritional value
- Consumers may be making decisions on isolated nutrition information rather than tradeoffs across multiple nutrition factors (for instance, just making choices based on calories without regard for sodium, carbohydrates, kinds of fat, and other considerations that may be important to individuals' needs)
- Only provides information for standard menu items, and so does not allow people to determine how the nutrition information changes for special orders
- May slow ordering (on menu boards more than menus)
- Some consumers may be put off or not want to know
- Presents uncertainty/risk for foodservice in terms of affecting choices within a restaurant (ordering lower-profit items, reducing quantities consumed) as well as across restaurants and other sources of meals (substitution effects across other restaurants, other away-from-home food outlets, or eating at home)
- Concern within industry that providing information in this way may act as a disincentive for customers to purchase "healthier" items (i.e., because of the possible stigma about compromised taste and flavor associated with "healthy" or health-oriented foods)

(The Keystone Forum on Away-From-Home Foods—Final Report, Appendix J, pages 129-30)

13. While marketing research has shown that providing nutrition information affects consumer attitudes and purchasing intentions, presenting nutrition information on restaurant menus may not improve food choices. One of the key references cited to support the statement "providing nutrition information on restaurant menus may empower consumers and can improve food choices" actually did not study the impact of calories on away from home purchases (*Burton S and Creyer EH. What Consumers Don't Know Can Hurt Them: Consumer Evaluations and Disease Risk Perceptions of Restaurant Menu Items. The Journal of Consumer Affairs. 2004;38:121-145*). In fact, the purpose of the study was to compare how consumers evaluate menu items when more complete

nutrition information *other than calories* is available [total fat, saturated fat, sodium, cholesterol], relative to when it is not. One aspect of the study examined how these nutrient value estimates influenced purchase intent when provided versus when no information was provided. The results demonstrate the powerful influence that *nutrition* information—not including calories—can have on consumer's evaluative processes. Of interest was the finding that consumers were not aware of the higher levels of fat, saturated fat and cholesterol in many of the foods.

14. The assumption that calorie information is by far the single most important piece of nutritional information for consumers is not supported by published scientific evidence. The most relevant research to address this assumption is summarized below.

- Burton *et al* first used a survey to examine the accuracy of consumers' expectations of the calorie, fat, saturated fat and sodium levels of restaurant foods (Burton S, Creyer EH, Kees J, Huggins K. *Attacking the Obesity Epidemic: The Potential Health Benefits of Providing Nutrition Information in Restaurants. Am J Public Health*, 2006; 96:1669-1675). The results indicated, not surprisingly, consumers significantly underestimated calorie values for items that were less healthful (90%), very unhealthful (99%) and to a lesser extent more healthful items (73%). In similar fashion, consumers expectations of nutrient levels [fat, saturated fat, sodium] were also significantly underestimated, more so for less-healthful to very-unhealthful foods. The importance of nutrient information in addition to calories in the selection of foods can not be underestimated or ignored. Both calories and nutrient content of foods are equally misunderstood, as shown in the chart below:

Consumer underestimation of calorie and nutrient information

Nutrient	Less-healthy	Very-unhealthy	More-healthy
Calories	90%	99%	73%
Total fat	90%	97%	37%
Saturated fat	80%	93%	30%
Sodium	93%	99%	92%

- Study # 2 in Burton *et al* (2006) investigated how the provision of nutrition information on a menu affected consumers' attitudes and purchase intentions when objective calorie and/or nutrient levels were provided. Purchase intentions for the less-healthy and very-unhealthy items were significantly lower when calories plus nutrient information were provided than when no information was provided and when calorie-only information was provided. Purchase intent for the more-healthy items was increased only when both calorie plus nutrient information were provided. When calorie levels were similar [e.g. chef's salad, turkey sandwich and chicken dinner] and nutrient content was *not* available, purchase intent did not differ between items. When calories plus the additional nutrition information *were* provided, selections which did not have higher perceived likelihoods of contributing to heart disease and weight gain were selected [e.g. the purchase intent for chef's salad significantly decreased]. In other words, consumers were better able to make the right choice for their long-term health goals when both calorie and nutrient information were provided.

Calories alone did not influence purchase intent when prevention of cardiovascular disease was of concern.

- More relevant and recent consumer research on consumer's knowledge of food and health demonstrated how little consumers knew about calories (*International Food Information Council (IFIC) Foundation. Food and Health Survey: Consumer Attitudes toward Food, Nutrition & Health. 2006. Washington, D.C.*):
 - Nearly 9 out of 10 (88%) were unable to accurately estimate the number of calories they should eat in an average day
 - 43% wouldn't even guess
 - Of the 57% who did provide an estimate, 79% incorrectly estimated the number of calories they should consume
 - Only 29% of consumers agree with the correct statement, "calories in general are what cause weight gain (i.e., all calories are the same)
 - 26% identified calories from fat to be most likely to cause weight gain
 - 20% identified calories from carbohydrates most likely to cause weight gain
- In another publication by Krukowski *et al*, the possible usefulness of calorie labeling legislation in restaurants was examined in community and college student samples (Krukowski RA, Harvey-Berino J, Kolodinsky J, Narsana RT, Desisto TP. *Consumers May Not Use or Understand Calorie Labeling in Restaurants. J Am Diet Assn. 2006;106:917-920*). Only 64% to 73% were able to accurately report daily caloric needs. Furthermore, 44% to 57% reported that if it were available, they would not likely use restaurant food caloric information. The author concludes that first

the focus should be on a public health education campaign designed to teach appropriate calorie intake values and food label reading skills to the general public and this should precede restaurant labeling.

Evidence-based approach to Public Policy.

15. Public policy should be based on sound scientific evidence, rather than what is perceived as common sense. With regard to nutrition information, it is imperative that consumers learn how to estimate their calorie requirements and use nutrition information, in addition to nutrition content and physical activity information, to achieve energy balance and long term health goals. The amount of relevant research on the issue of menu-board labeling of calories and nutrients is extremely limited at best. However, research demonstrates the powerful influence nutrition information and the context in which it is given can have on consumers' evaluative process. Burton and Creyer (2004) conclude that further research is needed to address the effects of the disclosure of nutrition information on menus/menu boards can have on consumers' selection of foods. Additional formats or locations other than menu boards may be identified that are more effective in helping consumers' make the right choice for themselves and their families.

16. Several studies show calorie information alone is not sufficient to help consumers' choose the most appropriate dietary choice for long-term health. The complexity of the task of evaluating dietary options and the many factors involved suggests the inclusion of calories alone next to price on the menu board may not be the right place to enable consumers' to make the most appropriate choice for long-term health. At present, examining all the data [cost, calories, total fat, saturated fat, sodium] at point of purchase on menu boards in quick serve restaurants

and in turn making a quick decision based on these data is virtually impossible when considering consumers' limited understanding of diet and health.

17. In sum, we strongly disagree with the New York City proposal. We think it overemphasizes the importance of calories and undermines the program we have developed in addition to the public health initiatives based on the Dietary Guidelines provided by the USDA. We think it will provide information in a way that will be meaningless and possibly misleading for many of our customers. We think it will not be effective in addressing the causes of obesity and the resultant public health concerns. We think scientific consensus should lead public policy and regulations. And the scientific basis for this regulation is unsubstantiated.

18. I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 28, 2008

A handwritten signature in cursive script that reads "Debra DeMuth". The signature is written in dark ink and is positioned above a horizontal line.

Debra DeMuth